

LEGISLATIVE RESEARCH COMMISSION

ADMINISTRATIVE RULES REVIEW COMMITTEE



1982
P. 17

REPORT TO THE 1981 GENERAL ASSEMBLY OF NORTH CAROLINA 1982 SESSION

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STATE OF NORTH CAROLINA
ADMINISTRATIVE RULES REVIEW COMMITTEE
LEGISLATIVE RESEARCH COMMISSION
STATE LEGISLATIVE BUILDING
RALEIGH 27611



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May 20, 1982

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TO THE MEMBERS OF THE 1981 GENERAL ASSEMBLY, SECOND SESSION:

The Legislative Research Commission herewith reports to the 1981 General Assembly, Second Session, on the work of its Administrative Rules Review Committee. The report is made pursuant to G.S. 120-30.17(2).

This report was prepared by the Legislative Research Commission's Administrative Rules Review Committee and is transmitted without recommendation by the Legislative Research Commission for your consideration.

Respectfully submitted,

Liston B. Ramsey

W. Craig Lawing

CoChairmen
Legislative Research Commission

ADMINISTRATIVE RULES REVIEW COMMITTEE
PROCEDURES

Article 6C of Chapter 120 of the General Statutes (G.S.) sets forth the statutory scheme underlying the legislative review of administrative rules. A copy of this Article is attached as Appendix A.

Administrative rules in North Carolina are reviewed by the legislative branch by the Legislative Research Commission's Administrative Rules Review Committee which is a permanent committee. The review began in October 1977 for a two-year trial period (Chapter 915 of the 1977 Session Laws). The 1979 General Assembly extended the life of the review process for an additional two years (Chapter 1030 of the 1979 Session Laws), and enlarged the membership of the Committee from seven to nine (Chapter 1314 of the 1979 Session Laws). The 1981 General Assembly rewrote Chapter 120 and gave the Committee additional powers to delay and suspend rules (Chapter 688 of the 1981 Session Laws); however, pursuant to the Attorney General's opinion that such powers are unconstitutional, the Committee has ceased to delay rules and is proposing legislation to delete such powers to the Second Session of the 1981 General Assembly.

The Legislative Research Commission, authorized by Article 6B of Chapter 120 of the General Statutes, is a general purpose study group. The Commission is co-chaired by the Speaker of the

House and the President Pro Tempore of the Senate and has five additional members appointed from each house of the General Assembly.

The Committee's ten members are appointed by the cochairmen of the Legislative Research Commission from the General Assembly for two-year terms. The cochairmen of the Committee are elected by the Committee members (G.S. 120-30.26). The names of the present Committee members are listed in Appendix B.

The Committee must meet monthly (G.S. 120-30.27). The Committee is staffed from the Legislative Services Office. The Director of Research and three staff attorneys aid the Committee's work on a part-time basis. The Committee employs a research assistant and two computer operators.

G.S. 120-30.25 required the Attorney General to submit copies of all rules filed prior to October 1, 1977 to the Legislative Research Commission for review by the Committee. Rules filed after this date must be filed with the Director of Research prior to being filed with the Attorney General. No rule is effective until filed with the Attorney General (G.S. 150A-59; American Guar. and Liab. Ins. Co. v. Ingram, 32 N. C. App. 552 [1977]) and no rule can be filed with the Attorney General unless it bears a notation that it has been filed with the Director of Research (G.S. 150-60).

G.S. 150A-58 defines rule for the purpose of filing requirements. A rule is every rule adopted by any agency but does not include rules relating only to internal management of any agency, directives or advisory opinions to any specific person or group with no statewide applicability, dispositions of any specific issue by adjudication, or rate or tariff orders.

The definition of agency excludes the State judiciary and legislature, the Employment Security Commission, and political subdivisions of the State. The Industrial Commission, the Utilities Commission, and the Department of Transportation for purposes of traffic sign ordinances and road and bridge weight limits are exempted from filing with the Director of Research by G.S. 150A-60 and G.S. 120-30.24(1).

G.S. 120-30.25(c) describes the information contained in the Agency Report (see Appendix C) which is required to be filed with each rule. The report requires a brief summary of the rule, citation of the statutory authority for the rule, a statement of the circumstances requiring adoption, amendment, or repeal of the rule, and the effective date of the rule.

Rules filed with the Director are numbered in the order in which they are received. The rules are summarized. With the aid of the computer, the rule's catchline, citation, summary, date of filing, and date of expiration of the review period are entered into a log. The professional staff reviews the rules filed for content and statutory authority.

G.S. 120-30.28 requires the Director to submit the rules to the Committee which determines if the agencies had statutory authority to promulgate the rules. At its monthly meeting, the Committee reviews the log. Under the procedure now followed by the Committee in response to the Attorney General's opinion, if the Committee finds that an agency lacked statutory authority to promulgate a rule, it "objects" to that rule. The Director transmits the report of the objection and the reasons for it to the agency together with a letter referencing the Attorney General's opinion and strongly urging the agency to take

corrective action. A copy of the objection is sent to the Governor, President of the Senate, Cochairmen of the Legislative Research Commission and the Attorney General. The Committee must review a rule no later than the last day of the first calendar month following the filing of the rule with the Director. In the case of rules for which the expiration period has expired, G.S. 120-30.35 allows the cochairmen of the Legislative Research Commission to call a public hearing on recommendation of the Committee or motion of any Commission member to review these rules. The statute sets a fifteen-day notice of hearing requirement. To date, the Commission has utilized this statute in one instance.

Following the monthly meeting, the staff sends letters of objection and of inquiry to the appropriate agencies pursuant to the Committee's direction. The Committee reports once a month to the Legislative Research Commission on the action taken on rules (G.S. 120-30.32).

An agency must amend a rule to which the Committee has objected or return it to the Committee without change within 30 days of notification of the objection (G.S. 120-30.28(c). To cure a defect cited as reason for the Committee's objection, an agency may amend a rule without complying with the notice and hearing requirements of G.S. 150A-12. (See G.S. 120-30.28(d).)

Objections by the Committee to rules and any removals of objections are noted in the history note of the rule contained in the Administrative Code (12 NCAC 2G .0411).

Under the procedures adopted by the Committee pursuant to the Attorney General's opinion, a rule's effectiveness is not affected by the administrative rules review procedure. In the

case of a rule to which the Committee has objected or in any other instance where the State's administrative practice and procedures require legislation, the Committee may submit a report to the next session of the General Assembly recommending appropriate legislation (G.S. 120-30.28(g)).

WORK

Through the April, 1982 meeting of the Committee, there have been 1,009 filings of rules. In the 55 months the Committee has been in existence, it has reviewed 17,721 rules. The table in Appendix D shows the number of rules reviewed by each year and month broken down into amendments, recodifications, adoptions, readoptions, repeals and emergency rules.

Pursuant to the authority contained in Article 6C of Chapter 120 of the General Statutes, the Legislative Research Commission's Administrative Rules Review Committee recommends the indicated legislative action on the following matters:

Administrative Rules Review Committee

Pursuant to an opinion of the Attorney General that the Committee's powers to delay and suspend rules are unconstitutional, the Committee at its April meeting decided to discontinue use of these powers and to recommend legislation to the Second Session of the 1981 General Assembly which deletes such powers from the General Statutes (See letter from Andrew Vanore dated April 9, 1982, Appendix E. See also "An Act to Alter the Powers of the Legislative Research Commission's

Administrative Rules Review Committee.")

The bill removes the delay provisions from Chapter 120 and makes several technical and conforming amendments to the Chapter. Since the Committee could no longer delay a rule under this bill, the procedure set forth concerning action by the Governor or the Council of State on a rule was also deleted from the Chapter.

Temporary Rules

At the suggestion of the Attorney General, the Committee is introducing legislation which will rewrite the present temporary rule statute (G.S. 150A-13). The section will be divided into two subdivisions covering those agencies which must meet notice and hearing requirements and those which do not. The grounds for filing a temporary rule have been expanded to include the effective date of a recent act of the General Assembly or the United States Congress, a federal regulation, or a court order.

The Committee would be able to object to a temporary rule due to lack of statutory authority or due to the agency's failure to make the finding required by G.S. 150A-13.

Administrative Procedure and Practice

Pursuant to G.S. 120-30.29(g), the Committee is recommending legislation specifically addressing rules which have concerned the Committee during the last year. (See "An Act to Improve Administrative Procedure and Practice as Recommended by the Administrative Rules Review Committee".)

Section 1 of the bill gives specific authority to the Board of Agriculture to require that inspection certificates be posted

by manufacturers of frozen or semifrozen desserts. G.S. 106-254 gives the Department specific authority to charge a \$5.00 inspection fee but does not mention an inspection certificate. A certificate is referred to in the Department's rules. (See 2 NCAC 9K .0203, Appendix G.)

Section 2 amends G.S. 106-503 by allowing the Department of Agriculture to set rates for leasing space at the State Fairgrounds without having to go through rulemaking procedures on each rate change. The Board of Agriculture must advertise consideration of any proposed rate changes in its published notice of hearing. (See 2 NCAC 20B .0426, Appendix H.)

Sections 3 through 7 amend Chapter 74C which governs the Private Protective Services Board. Section 3 empowers the Board to administer written and oral examinations. (See "An Act to Improve Administrative Procedure and Practice as Recommended by the Administrative Rules Review Committee", Appendix F.) Section 4 consolidates all fees charged by the Board into G.S. 74C-9e. (See "An Act to Improve Administrative Procedure and Practice as Recommended by the Administrative Rules Review Committee", Appendix F.) Several of these fees have been raised at the Board's request. The section also clarifies the Board's authority to issue duplicate and replacement licenses. The remaining sections make conforming changes.

Section 8 amends G.S. 143B-67 to authorize the North Carolina Public Librarian Certification Commission to require certain applicants to take the Comprehensive Examination in Library Science. (See 7 NCAC 2F .0005, Appendix I.)

Sections 9 and 10 amend Chapter 150A of the General Statutes.

Section 9 allows an agency to adopt by reference "any plan or material which is adopted to meet the requirements" of any federal agency. The plan or material must have been approved by that agency and cannot include any State policy or rule as defined in G.S. 150A-10. The Committee has dealt with numerous rules promulgated by agencies which referenced State plans and other materials commonly situated in manuals. The Committee cochairmen appointed a Subcommittee on Manuals which has studied these recurrent issues and proposed this solution.

Section 10 requires the Attorney General's Office to furnish the Legislative Research Commission with two copies of the Administrative Code on microfiche, which will allow one copy to be kept in the Legislative Library and one copy for the Committee's use.

Correction

Due to an inconsistency in Chapter 150A and related statutes dealing with the effective date and filing requirements which must be met by the Department of Correction, the Committee is introducing legislation which will amend G.S. 148-11 to state that rules governing the State prison system must be filed in accordance with Article 5 of Chapter 150A. Temporary rules would be filed in accordance with G.S. 150A-13 but the Department would be allowed two working days after adoption of such rules to file them.

G.S. 150A-1 is also amended to specify that Article 5 and G.S. 150A-13 apply to the Department.

The Committee reviewed the rules of the Board of Examiners for Nursing Home Administrators and initially objected to those rules which dealt with the administrator-in-training program. (See Letter of objection dated November 20, 1981, Appendix J.) The objection was later removed by the Committee and an agreement was reached between the Committee and the Board that the Committee would propose legislation which would give the Board specific statutory authority to establish and administer this program. The proposed bill does give the Board such authority. It also adds the terms "administrator-in-training" and "preceptor" to the definitions section of Article 20 of Chapter 90 (Nursing Home Administrator Act) and alphabetizes that section. (See "An Act to Amend the Nursing Home Administrator Act, Appendix F.)

Insurance

The Committee objected to two rules filed by the Department of Insurance concerning Health Maintenance Organizations and at the request of the Committee the Department has provided a proposed bill which would give the Commissioner specific authority to impose these rules. (See "An Act to Amend the Powers of the Commissioner of Insurance to Regulate Health Maintenance Organizations", see Appendix F.)

Section 1 of the act allows the Commissioner to require of an applicant for a certificate of authority a three-year actuarial projection of initial operating results anticipated. This requirement has been imposed by 11 NCAC 14 .0303 to which the Committee has objected. (See Appendix K.)

Section 2 allows the Commissioner to require a deposit of securities up to a maximum of \$25,000 as is presently required by 11 NCAC 14 .0307 to which the Committee also objected. The deposits shall be in the form of cash, securities, certificates of deposit, or surety bonds. (See Appendix L.)

The Committee is introducing this legislation at the request of the Department.

CHAPTER 120. GENERAL ASSEMBLY

ARTICLE 6C.

Review of Administrative Rules.

"§ 120-30.24. Definitions.--As used in this Article:

- (1) 'Agency' means every agency, institution, board, commission, bureau, department, division, council, member of the Council of State, or officer of the executive branch of State government, any provision of any other statute to the contrary notwithstanding. The provisions of this Article do not apply to agencies in the judicial branch of State government, agencies in the legislative branch of State government, the Industrial Commission, the Utilities Commission, the Employment Security Commission, counties, cities, towns, villages, other municipal corporations or political subdivisions of the State or any agencies of such subdivisions, county or city boards of education, the University of North Carolina, other local public districts, units, or bodies of any kind, or private corporations created by act of the General Assembly.
- (2) 'Commission' means the Legislative Research Commission.
- (3) 'Committee' means the Administrative Rules Review Committee created by G.S. 120-30.26.

- (4) 'Director' means the Director of Research of the Legislative Services Commission.
- (5) 'rule' means every rule, regulation, ordinance, standard, and amendment thereto or repeal thereof adopted by any agency and includes rules and regulations regarding substantive matters, standards for products, and procedural rules for complying with statutory or regulatory authority or with requirements or executive orders of the Governor.

'Rule' does not include:

- a. Rules, procedures, or regulations that relate only to the internal management of an agency;
- b. Directives or advisory opinions to any specifically named person or group with no general applicability throughout the State;
- c. Disposition of any specific issue or matter by the process of adjudication;
- d. Orders establishing or fixing rates or tariffs;
or
- e. Rules, by the Department of Transportation, relating to traffic sign ordinances, and road and bridge weight limits.

"§ 120-30.25. Filing of rules.--(a) On October 1, 1977, the Attorney General shall transfer to the office of the Legislative Research Commission a copy of every rule that has been filed with him pursuant to article 5 of General Statutes Chapter 150A. Rules adopted prior to October 1, 1977, may be reviewed by the Committee.

(b) Rules adopted by an agency on or after October 1, 1977, shall be filed in the office of the Director prior to the filing made with the Attorney General pursuant to G.S. 150A-59.

(c) The rules filed with the Director pursuant to subsection (b) of this section shall be accompanied by a report. This report shall contain:

(1) A brief summary of the content of the rule if adopted or repealed, or a brief summary of the change in the rule if amended;

(2) A citation of the enabling legislation purporting to authorize the adoption, amendment, or repeal of the rule;

(3) A statement of the circumstances that required adoption, amendment, or repeal of the rule; and

(4) A statement of the effective date of the rule.

(d) Executive orders of the Governor are required to be filed, but executive orders of the Governor are not subject to the provisions of G.S. 120-30.28 through G.S. 120-30.35. (1977, c. 915, s. 1; 1979, c. 571, s. 2.)

"§ 120-30.26. Administrative Rules Review Committee.--There is created a permanent committee of the Legislative Research Commission to be known as the Administrative Rules Review Committee. The Committee is composed of 10 members, five representatives appointed by the Commission chairman from the House of Representatives, and five senators appointed by the Commission chairman from the Senate. On October 1, 1977, and biennially thereafter, the chairmen of the Commission shall appoint the Committee members from the membership of the General Assembly. The members serve for terms of two years, or until

they cease to be members of the General Assembly, whichever occurs first. The members so appointed shall elect two of their number to serve as cochairmen. Any vacancy that occurs in the membership of the Committee for any reason other than the expiration of a term shall be filled for the remainder of the unexpired term by appointment of a member of the General Assembly by the authority making the original appointment.

"§ 120-30.27. Meetings of Committee.--The Committee shall meet at least monthly at times and places specified by the chairman. A quorum of the Committee consists of a cochairman and four other members of the Committee or a majority of the Committee, whichever is fewer. The members of the Committee shall be compensated for attending meetings as provided in G.S. 120-30.18. Professional, clerical or other employees required by the Committee shall be provided in accordance with G.S. 120-32. (1977, c. 915, s. 1; 1979, 2nd Sess., c. 1314, s. 2.)

"§ 120-30.28. Review of rules.--(a) After a rule is filed with the Director, he shall submit it to the Committee which may determine whether or not the agency acted within its statutory authority in promulgating the rule. The Committee shall review a rule submitted to it by the Director not later than the last day of the first calendar month following the filing of the rule with the Director. The Committee, by a majority vote of the members present and voting, may extend the time for review of a rule by 60 days to obtain additional information on the rule. The Director shall file notice of the extension of time for review of a rule with the agency and the Attorney General. Upon that filing, the effectiveness of the rule is delayed for a 60-day period.

(b) If the Committee finds that an agency did not act within its statutory authority in promulgating a rule or a part of the rule, the Committee, pending review by the Governor or the Council of State pursuant to this section, shall object and delay the effectiveness of the rule or the part of the rule in which the Committee finds that the agency exceeded its statutory authority. The Director of Research shall transmit to the Governor, the President of the Senate, the cochairmen of the Legislative Research Commission, the Attorney General, and the agency a written report of the objection and delay of the rule or its part and the reasons for the delay. The delay of the effectiveness of the rule or its part is effective when the Attorney General receives the written report transmitted by the Director of Research. A rule or its part that is delayed is not 'effective' as defined in G.S. 150A-2(2a), unless a written order is received by the Attorney General ending the delay pursuant to subsection (f).

(c) Within 30 days after receipt of the Committee's written report, an agency shall either amend or repeal the rule to cure the defects cited as reasons for the Committee's objection and delay or return the rule unamended to the Committee.

(d) While the effectiveness of a rule or its part is delayed, the agency which has promulgated it may not adopt another rule which has substantially identical provisions to those for which the Committee delayed the effectiveness of the original rule or part of rule. To cure the defects cited as reasons for the Committee's delay, the agency may amend or repeal that rule without complying with the notice and hearing requirements

contained in G.S. 150A-12. The curative rule is effective upon its filing with the Attorney General.

(e) The filing of an amendment to a rule places the entire rule before the Committee for its review.

(f) If an agency does not amend or repeal a delayed rule to cure the defects cited as reasons for the Committee's objection and delay, the Committee shall transmit to the Governor and the cochairmen of the Legislative Research Commission, the written report of the objection and delay of the rule containing the reasons for the objection and delay, and the notation that the agency returned the rule unamended to the Committee or failed to return the rule within the time specified in subsection (c).

(1) If the rule whose effectiveness was delayed was promulgated by an agency of the Department of

- a. Administration
- b. Commerce
- c. Correction
- d. Crime Control and Public Safety
- e. Cultural Resources
- f. Human Resources
- g. Natural Resources and Community Development
- h. Revenue, or
- i. Transportation

the Governor, within 30 days of receipt may disagree with the Committee's position and end the delay.

(2) If the rule whose effectiveness was delayed was promulgated by any other agency, the Council of State by majority vote, within 45 days of receipt

of the Committee's report by the Governor, may disagree with the Committee's position and end the delay. Upon receipt of the Committee's report by the Governor, he shall transmit a copy of that report to the other Council of State members.

If the Governor or the Council of State disagrees with the Committee's position, the Governor, acting either for himself or for the Council of State, as the case may be, shall send to the Attorney General, the agency, and to the Committee a written order ending the delay of the effectiveness of the rule. The delay of the effectiveness of the rule is ended upon receipt by the Attorney General of the Governor's written order.

Notwithstanding any other provision of law, if the Governor or the Council of State, as the case may be, fails to end the delay of the rule, within the applicable time specified in this subsection after receipt of the Committee's report, the rule or its part is automatically repealed.

(g) When a rule or its part has been delayed pursuant to subsection (b) and the Governor or the Council of State, as the case may be, disagrees with the Committee's position and ends the delay, the Committee shall submit a bill to repeal the delayed rule or its part to the General Assembly if then in session or, if not in session, to it the next regular session. The Committee may consider and recommend to the General Assembly any legislation it believes would improve administrative procedure and practices in this State. A bill submitted to the General Assembly under this subsection is eligible for consideration in that part of the regular session to which the bill is submitted."

G.S. 120-30.29. Repealed by Session Laws 1981, Chapter 688.

"§ 120-30.29A. Actions on rules.--(a) The Committee may institute an action in the Superior Court of Wake County for a declaratory judgment on the issue of whether a rule that has been delayed and that delay has been ended pursuant to this Article is neither valid nor within the statutory authority of the agency.

The agency whose rule has been objected to and delayed shall be notified of the commencement of the action by service process pursuant to G.S. 1A-1, Rule 4. The Committee shall have standing on behalf of the General Assembly to appear in any action authorized by this section or any appeals therefrom. Notwithstanding any other provision of law, the Committee may direct any licensed attorney on the staff of the General Assembly, or contract with other counsel, to represent the Committee in the action.

(b) In any action in which a rule is determinative of the outcome and in which the rule was objected to by the Committee, the agency must prove that the rule is valid as defined in G.S. 150A-2(9) and within the statutory authority of the agency.

The clerk of the superior court shall file a copy of the order of the court with the Attorney General."

G.S. 120-30.30. Repealed by Session Laws 1981, Chapter 688.

G.S. 120-30.31. Repealed by Session Laws 1981, Chapter 688.

"§ 120-30.32. Reports of the Committee.--The Committee shall report monthly to the Commission on all actions taken on rules." (1977, c. 915, s. 1.)

G.S. 120-30.33. Repealed by Session Laws 1981, Chapter 688.

"§ 120-30.34. Temporary rules.--Rules adopted in accordance with the procedures in G.S. 150A-13 may be reviewed by the Committee but are not subject to objection and delay as provided in G.S. 120-30.28. The Committee may review the reasons given for the adoption of a temporary rule. (1977, c. 915, s. 1; 1981, c. 1127, s. 55.)

"§ 120-30.35. Hearings.--(a) Notwithstanding the time limitation on review of rules contained in G.S. 120-30.28(a), the cochairmen of the Commission may at any time call a public hearing before the Committee on any rule or part of rule upon the recommendation of the Committee or upon the motion of any member of the Commission. Within 60 days after the public hearing, the Committee may find that the agency did not act within its statutory authority in promulgating the rule or its part and delay the continued effectiveness of the rule or its part in accordance with subsections b, c, d, e, f, and g of G.S. 120-30.28.

(b) At least 15 days before the hearing, notice of the hearing shall be given to the rule-making agency and to such other persons that desire to be heard, that the cochairmen of the Commission consider to be persons that may be affected by the rule, or that may request copies of the notice.

(c) The provisions of G.S. 120-19 and 120-19.1 through 120-19.4 shall apply to the proceedings of the Committee.

(1977, c. 915, s. 1.)

"§ 120-30.36. Failure to object and delay; inadmissibility into evidence.--(a) The failure of the Committee to object and

delay the effectiveness of a rule or its part shall not be deemed to be approval of the statutory authority of the rule or its part by the Committee, Commission or the legislative branch.

(b) Evidence of the Committee's failure to object and delay the effectiveness of the rule or its part shall be inadmissible in all civil and criminal trials or other proceedings before courts, administrative agencies, or other tribunals."

Rules that were filed, but whose review periods have not expired, under the procedures in effect prior to the effective date of this act shall be reviewed and these rules or their parts may be delayed under the provisions of this act prior to December 1, 1981. The continued effectiveness of rules that have been reviewed and that have been objected to by the Administrative Rules Review Committee or the Legislative Research Commission, or both, under the procedures in effect prior to the effective date of this act and that have not been amended or repealed by the appropriate agency in accordance with the objections of the Committee or the Commission, may be delayed by the Committee not later than December 1, 1981, under the provisions of G.S. 120-30.28(b), (c), (d), (e), (f) and (g).

APPENDIX B

LEGISLATIVE RESEARCH COMMISSION MEMBERSHIP

House Speaker Liston B. Ramsey CoChairman	Senate President Pro Tempore W. Craig Lawing, CoChairman
Representative Chris S. Barker, Jr.	Senator Henson P. Barnes
Representative John T. Church	Senator Carolyn Mathis
Representative Gordon Greenwood	Senator William D. Mills
Representative John J. Hunt	Senator Russell Walker
Representative Lura S. Tally	Senator Robert W. Wynne

MEMBERSHIP OF ADMINISTRATIVE RULES REVIEW COMMITTEE

1981-1982

Senator Robert B. Jordan, III, CoChairman
Representative James F. Morgan, CoChairman
Senator William A. Creech
Senator Cecil R. Jenkins, Jr.
Senator Charles E. Vickery
Senator Robert D. Warren
Representative Anne C. Barnes
Representative William E. Clark
Representative Martin L. Nesbitt
Representative Kenneth B. Spaulding

AGENCY REPORT: Legislative Review of Administrative Rules
(G.S. 120-30.20 et seq.)

Date: _____ (for Receipt Stamp)

From: _____
(name)
Adm. Procedures Act Coordinator - _____
(agency & address)

Phone: _____

To: Terrence D. Sullivan
Legislative Research Commission
2129 State Legislative Building
Raleigh, North Carolina 27611 - Phone: 919-733-7044

RULE: _____
(citation; N. C. Administrative Code)

(catchline)

- (1) RULE SUMMARY

- (2) STATUTORY AUTHORITY CITATION

- (3) CIRCUMSTANCES REQUIRING RULE

- (4) EFFECTIVE DATE

1) 60 DAY INITIAL REVIEW PERIOD

G.S. 120-30.23(c) sets up a 60 day period from the time of filing of a rule for the Administrative Rules Review Committee to review the rule. If an Agency has not been notified of an objection to a rule within 60 days of the filing of the rule, the Agency can consider that the rule has been accepted (not approved) by the Committee. No further formal review of the rule will be undertaken by the Committee unless there is a decision to proceed under the public hearing provision of G.S. 120-30.30.

2) CITATION TO FEDERAL LAW OR REGULATION

G.S. 120-30.20(c)(2) requires citation of North Carolina statutory authority for a rule when the rule is filed with the Committee. The Committee requests Agencies to also cite any Federal law or regulation that is relevant to the rule. Some brief treatment of the relevancy of the Federal law or regulation should be included in the statement of circumstances requiring the rule.

3) FILING OF READOPTED RULES

The case of American Guarantee & Liability Insurance Company v. Ingram, 32 N.C. App. 552, has been interpreted to require readoption of rules that do not meet certain procedural requirements. The Committee requests that Agencies give notice of all rules readopted on or after October 1, 1977, in response to this case, but the report on a rule required by G.S. 120-30.20(c) is necessary only with respect to new material included in the readoption. A report shall be made to the Committee only on new rules, amendments to old rules, and repeal of old rules; no report is required on simple readoption of rules identical to old rules.

11/1/77

LOG NO. & DATE

NUMBER OF RULES

	Amend.	Recod.	Adopt.	Readopt	Repeal	Emerg.	TOTALS
# 1 - Nov. '77	42	3	35	0	1	0	81
# 2 - Dec. '77	40	0	26	5	5	0	76
1977 TOTALS	82	3	61	5	6	0	157
# 3 - Jan. '78	130	0	140	29	12	0	311
# 4 - Feb. '78	214	0	44	9	7	0	274
# 5 - March '78	136	0	71	3	10	0	220
# 6 - April '78	139	15	106	2	44	43	349
# 7 - May '78	58	0	31	7	7	5	108
# 8 - June '78	71	0	23	6	21	0	121
# 9 - July '78	80	0	222	5	30	0	337
# 10 - Aug. '78	301	0	90	739	20	6	1156
# 11 - Sept. '78	36	0	172	0	63	1	272
# 12 - Oct. '78	112	0	95	0	98	2	307
# 13 - Nov. '78	263	0	294	0	13	1	571
# 14 - Dec. '78	165	0	115	0	48	2	330
1978 TOTALS	1705	15	1403	800	373	60	4356

LOG NO. & DATE

	Amend.	Recod.	Adopt.	Readont	Repeal	Emerg.	TOTALS
#15 - Jan. '79	61	0	163	0	21	1	246
#16 - Feb. '79	78	0	22	0	18	0	118
#17 - March '79	117	0	46	0	18	1	182
#18 - April '79	76	0	93	5	32	0	206
#19 - May '79	176	0	73	17	7	0	273
#20 - June '79	223	0	196	38	62	0	519
#21 - July '79	169	0	82	0	78	1	330
#22 - Aug. '79	118	0	339	1	36	0	494
#23 - Sept. '79	127	0	126	1	18	0	272
#24 - Oct. '79	194	0	195	0	20	70	479
#25 - Nov. '79	98	0	108	0	16	11	233
#26 - Dec. '79	216	0	252	0	16	12	496
1979 TOTALS	1653	0	1695	62	342	96	3848

LOG NO. & DATE

	Amend.	Recod.	Adopt.	Readopt	Repeal	Emerg.	TOTALS
#27 - Jan. '80	140	2	360	0	15	1	518
#28 - Feb. '80	51	0	252	12	38	0	353
#29 - March '80	91	0	169	0	10	0	279
#30 - April '80	239	0	123	0	21	6	389
#31 - May '80	27	0	18	0	6	1	52
#32 - June '80	248	87	129	0	23	0	487
#33 - July '80	380	3	149	0	31	1	564
#34 - Aug. '80	118	1	55	0	8	1	183
#35 - Sept. '80	135	3	256	0	10	0	404
#36 - Oct. '80	120	0	230	0	14	2	366
#37 - Nov. '80	212	0	163	21	35	0	431
#38 - Dec. '80	144	0	165	87	63	5	464
1980 TOTALS	1905	96	2069	120	283	17	4490

FINAL TOTALS	5345	114	5228	987	1004	173	12851
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LOG NO. & DATE	Amend.	Recod.	Adopt.	Readopt	Repeal	Emerg.	Temp.	TOTAL
#39 - Jan. '81	33	0	17	0	7	0	0	57
#40 - Feb. '81	50	1	95	0	23	4	0	173
#41 - March '81	141	0	142	0	20	0	0	303
#42 - April '81	126	0	195	0	59	2	0	382
#43 - May '81	96	1	113	7	15	0	0	232
#44 - June '81	76	0	81	0	25	1	0	183
#45 - July '81	206	0	102	0	46	2	0	356
#46 - Aug. '81	111	0	186	0	63	0	0	360
#47 - Sept. '81	159	1	66	0	60	0	0	286
#48 - Oct. '81	219	0	94	9	92	17	0	431
#49 - Nov. '81	58	2	222	82	32	0	9	405
#50 - Dec. '81	128	0	452	0	105	0	8	693

1981 TOTALS	1403	5	1765	98	547	26	17	3,861
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RECEIVED

APR 14 1982

State of North Carolina

LEGISLATIVE SERVICES OFFICE

Department of Justice

RUFUS L. EDMISTEN
ATTORNEY GENERAL

P. O. Box 629
RALEIGH
27602

April 9, 1982

The Honorable Robert B. Jordan, III
The Honorable James F. Morgan
Cochairmen
Administrative Rules Review Committee
Legislative Research Commission
State Legislative Building
Raleigh, N. C. 27611

Dear Gentlemen:

In my meeting with you on March 1, 1982, I related my opinion as to the impact of State ex rel Wallace v. Bone and the subsequent advisory opinion on the operation of the Administrative Rules Review Committee. Due to its unique role and its legislative character, it is my opinion that only a portion of the Committee's operation is affected by the Supreme Court's recent decisions concerning separation of power.

The 1977 Session of the General Assembly, in an effort to obtain greater oversight over the exercise of rule making authority delegated by it to administrative agencies, enacted Article 6C of Chapter 120 of the General Statutes. That article established an Administrative Rules Review Committee with the authority to review and object to regulations. The 1981 Session of the General Assembly amended Article 6C to confer upon the Committee the authority to object to and delay enforcement of regulations which, in the opinion of the Committee, were beyond the statutory authority of the adopting agency.

The Administrative Rules Review Committee is a permanent committee of the Legislative Research Commission and is composed of five Representatives and five Senators, G.S. §120-30.26. After an agency adopts a rule, the rule must be filed with the Director of Research of the Legislative Services Commission, who submits the rule to the Committee for review as to whether or not the agency acted within its statutory authority. The Committee must review the rule by the last day of the first calendar month following the filing with the Director. If the Committee needs more time to obtain additional information on the rule, the review period may be extended by 60 days. The effectiveness of the rule is delayed during this time, G.S. §120-30.28(a). If, during the review, the Committee finds that the agency did not act within its statutory authority, the Committee may object and delay the

effectiveness of the rule, G.S. §120-30.28(b). This delay may be vetoed by the Governor or the Governor and Council of State during a period of extended delay, G.S. §120-30.28(f). If the Governor or Council of State ends the Committee's delay, the Committee shall submit a bill to repeal the delayed rule or part of a rule to the General Assembly, G.S. §120-30.28(g).

The Committee has several supplemental powers. First, the Committee may institute an action in Superior Court of Wake County for declaratory judgment to determine whether the contested rule is valid or within the statutory authority of the agency, G.S. §120-30.29A. Second, the cochairmen of the Commission may call a public hearing before the Committee on any rule, G.S. §120-30.35.

Based on an analysis of the statute and the recent decisions of the Supreme Court, it is my opinion that the exercise by the Committee of the power to delay, suspend or extend the review period of a rule violates the Constitution in four ways.

1. Such committee action infringes in an unconstitutional way on the exercise of executive power.
2. The committee action violates the constitutional prohibition against the suspension of the laws for the execution thereof.
3. The General Assembly may not delegate the exercise of such power to a committee.
4. Such committee action infringes upon the judicial power in an unconstitutional way.

In *State ex rel Wallace v. Bone*, the Supreme Court described at length the powers vested by law in the Environmental Management Commission, Slip Opinion pp. 19-21. Among the described powers of the Commission was the power to make regulations for certain purposes. After reviewing the powers of the Commission the court said:

"It is crystal clear to us that the duties of the EMC are administrative or executive in character and have no relation to the function of the legislative branch of government, which is to make laws. We agree with the Georgia court's holding in *Greer*, that the Legislature cannot constitutionally create a special instrumentality of government to implement specific legislation and then retain some control over the process of implementation by appointing legislators to the governing body of the instrumentality."

In my opinion a committee of the Legislature acting to delay or suspend the effectiveness of a regulation also retains control over the process of implementation in a constitutionally impermissible way.

Article 1, Section 7 of the Constitution provides:

"All power of the suspending laws or the execution of laws by any authority, without the consent of the representatives of the people, is injurious to their rights and shall not be exercised."

The power to adopt regulations for the implementation of specific legislation is, in my opinion, in every instance, either the making of law under the delegated power or the execution of the law. Thus, committee action suspending or delaying the effective regulation violates the constitutional prohibition.

In a recent advisory opinion to the Governor, Lt. Governor, and Speaker of the House of Representatives, the Supreme Court reviewed the constitutionality of G.S. §143-23(b), as enacted by Section 82 of Chapter 1127 of the 1981 Session Laws and G.S. §120-84 as enacted by Section 63 of the same chapter to determine whether those provisions were contrary to provisions of the North Carolina Constitution. In its review of G.S. §120-84 the court stated the issue as:

"May the General Assembly delegate to a legislative committee the power to determine if the grants will be accepted, and, if accepted, how they will be spent?"

The court answered the question by saying:

"With regard to part (2) of the inquiry, if the General Assembly has the authority to determine whether the state or its agencies will accept the grants in question, and, if accepted, the authority to determine how the funds will be spent, it is our considered opinion that the General Assembly may not delegate to a legislative committee the power to make those decisions."

"In several of the instances set forth in G.S. §120-84.5 the committee would be exercising legislative functions. In those instances there would be an unlawful delegation of legislative power. In other instances the committee would be exercising authority that is executive or administrative in character. In those instances there would be a violation of the separation of powers provisions of the Constitution and an encroachment upon the constitutional power of the governor."

The same considerations apply to the operation and action of the Administrative Rules Committee.

Finally, I have concluded that the exercise of the power to suspend or delay a regulation encroaches upon the judicial power. The action of the Committee is to determine whether a given regulation is within the statutory authority granted to the agency. Based on that determination the Committee may delay or suspend the effectiveness of a regulation. Determining, in a dispositive sense, whether an agency acted within its statutory authority is a question limited to judicial competence. The function of the judicial branch is to declare the law. In Lanier v. Vines, 274 N.C. 486 (1968), the Supreme Court reiterated that the Legislature has no judicial power. Thus, the Legislature may not confer upon its own committee powers it does not have.

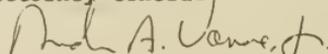
As I stated to you, the Committee may continue to function and operate. In reviewing rules and offering your expertise in evaluation to the agencies, I find no constitutional problems and in fact, laud your efforts. Any method which encourages agencies to approach rule-making in a responsible way and isolates potential violators in an official manner is sound public policy and should not be abated. In that regard, I encourage you to subject rules to scrutiny and notify the agency and our office of any questionable provisions.

In light of this advice, we have looked at alternatives available which may have similar impact yet would withstand constitutional challenge. The following suggestions may prove helpful should you determine a change is necessary. First of all, the committee may continue to operate under the existing statute but refrain from delaying the effectiveness of a rule under any of its discretionary powers including extending the review period, delaying the effective date of a rule and proceeding to the Superior Court of Wake County for declaratory relief. By choosing this route, the committee would be acting as if the superseded legislation was still in effect. Secondly, the committee could propose legislation to the General Assembly authorizing the committee to introduce a bill to repeal the enabling statute for any rule objected to during the review process. This specific remedy would be purely legislative in character and summarily address the issue. Finally, the review period could be extended in order to allow further communication between the committee and the agency after an objection had been lodged against a rule. Though this method is informal, the added time to the rule-making process could result in an increased reduction in the ability of agencies to respond to current problems.

There are other methods and concepts which might be suitable to your process, and I encourage you and your staff to carefully evaluate alternatives. I offer the assistance of our staff to you in addressing this issue. If you desire more analysis or information please let me know. Thank you for your attention and cooperation.

Very truly yours,

RUFUS L. EDMISTEN
Attorney General



Andrew A. Vanore, Jr.
Senior Deputy Attorney General

HOUSE DRH1160 - RF

Short Title: Administrative Procedure.

(Public)

Representative

Referred to:

A BILL TO BE ENTITLED

AN ACT TO IMPROVE ADMINISTRATIVE PROCEDURE AND PRACTICE AS
RECOMMENDED BY THE ADMINISTRATIVE RULES REVIEW COMMITTEE.

The General Assembly of North Carolina enacts:

Section 1. G.S. 106-253 is amended by inserting a sentence after the first sentence to read as follows:

"The Board is authorized to require the posting of inspection certificates."

Sec. 2. G.S. 106-503 is amended by adding a new third paragraph to read:

"The Board of Agriculture, after giving notice and receiving public comment pursuant to G.S. 150A-12, and pursuant to the provisions of Chapter 146 of the General Statutes, may establish a schedule of rental rates for Fair properties and specifications for the issuance of premiums so as to provide a State Fair and other projects."

Sec. 3. G.S. 74C-5(2) is amended by inserting the following between "qualifications" and "and":

", establish and require written or oral examinations,".

Sec. 4. G.S. 74C-9(e) is amended by inserting the following between "license" and "in" in subdivision (4): "or duplicate license"; and further amended by deleting the period in subdivision (5) and inserting in lieu thereof a semicolon and by adding new subdivisions to read:

"(6) A new, renewal, replacement or reissuance fee for a registration identification card in an amount not to exceed twenty-five dollars (\$25.00);

(7) An application fee for an armed private security officer firearm registration permit not to exceed fifty dollars (\$50.00);

(8) A new or replacement fee for an armed private security officer firearm registration permit not to exceed twenty-five dollars (\$25.00);

(9) An application fee for certification as a firearms trainer not to exceed fifty dollars (\$50.00);

(10) A renewal or replacement fee for firearms trainer certification not to exceed twenty-five dollars (\$25.00);

(11) A new nonresident temporary permit fee not to exceed twenty-five dollars (\$25.00)."

Sec. 5. G.S. 74C-11(d) is amended by deleting the last sentence of the paragraph.

Sec. 6. G.S. 74C-13 is amended by deleting the last sentences of subsections (c), (d) and (k).

Sec. 7. G.S. 74C-18(b) is amended by deleting the last sentence of the paragraph.

Sec. 8. G.S. 143B-67 is amended by inserting the following sentence at the end of the first paragraph:

"The Commission is authorized to establish and require written examinations for certified public librarian applicants."

Sec. 9. G.S. 150A-14 is amended by rewriting the first sentence to read as follows:

"An agency may adopt by reference in its rules, without publishing the adopted matter in full:

(1) all or any part of a code, standard, or regulation which has been adopted by any other agency of this State or any agency of the United States or by a generally recognized organization or association; or

(2) any plan or material which is adopted to meet the requirements of any agency of the United States and approved by that agency but which does not include any State policy or State rule as defined in G.S. 150A-10."

Sec. 10. G.S. 150A-63(e) (1) as the same appears in the 1981 Cumulative Supplement to Volume 3C is amended by rewriting the last two lines to read:

"Governor; and two copies to the Legislative Research Commission for the use of the General Assembly;".

Sec. 11. This act is effective upon ratification.

Short Title: Temporary Rules.

(Public)

Representative

Referred to:

A BILL TO BE ENTITLED

AN ACT TO REWRITE THE TEMPORARY RULE PROVISION OF CHAPTER 150A AS
RECOMMENDED BY THE ATTORNEY GENERAL.

The General Assembly of North Carolina enacts:

Section 1. G.S. 150A-13 as amended by Chapter 688 of
the 1981 Session Laws (First Session, 1981) is further amended to
read as follows:

"§ 150A-13. Temporary rules.--(a) If an agency which is not
exempted from the notice and hearing requirements of this Article
by G.S. 150A-1 determines in writing that:

- (1) adherence to the notice and hearing requirements of
this Article would be contrary to the public
interest; and that
- (2) the immediate adoption, amendment, or repeal of a
rule is necessitated by:
 - a. the public health, safety, or welfare; or
 - b. the effective date of a recent act of the
General Assembly or the United States
Congress; or
 - c. a federal regulation; or

d. a court order,
the agency may adopt, amend, or repeal the rule without prior notice or hearing or upon any abbreviated notice or hearing the agency finds practicable. The agency must accompany its rule filing with the Attorney General and the Legislative Research Commission's Administrative Rules Review Committee with the agency's written certification of the finding of need for the temporary rule, together with the reasons for that finding and a copy of the notice of hearing on the proposed permanent rule.

(b) If an agency which is exempted from the notice and hearing requirements of this Article under G.S. 150A-1 determines in writing that the immediate adoption, amendment, or repeal of a rule is necessitated by:

- (1) the public health, safety, or welfare; or
- (2) the effective date of a recent act of the General Assembly or the United States Congress; or
- (3) a federal regulation; or
- (4) a court order,

the agency may adopt, amend, or repeal the rule. The agency must accompany its rule filing with the Attorney General and the Legislative Research Commission's Administrative Rules Review Committee with the agency's written certification of the finding of need for the temporary rule together with the reasons for that finding. Provided, however, that the Department of Correction shall file any temporary rule within two working days of its adoption by the Secretary under G.S. 148-11.

(c) Rules filed under subsections (a) and (b) may be effective

for a period of not longer than 120 days. An agency adopting a temporary rule shall begin normal rule-making procedures on the permanent rule under this Article at the same time the temporary rule is adopted."

Sec. 2. G.S. 120-30.34 is rewritten to read:

"(a) Rules adopted in accordance with the procedures in G.S. 150A-13 shall be reviewed by the Committee and are subject to objection as provided in G.S. 120-30.28.

(b) The Committee shall review the reasons given for the adoption of a temporary rule and may object to the rule due to the agency's failure to make the finding required by G.S. 150A-13."

Sec. 3. This act is effective upon ratification.

Short Title: Administrative Rules.

(Public)

Representative

Referred to:

A BILL TO BE ENTITLED

AN ACT TO ALTER THE POWERS OF THE LEGISLATIVE RESEARCH
COMMISSION'S ADMINISTRATIVE RULES REVIEW COMMITTEE.

The General Assembly of North Carolina enacts:

Section 1. G.S. 120-30.25(c) is amended by inserting
the following between "report" and the period:

"on a form approved by the Administrative Rules Review
Committee".

Sec. 2. G.S. 120-30.28 as rewritten by Chapter 688 of
the Session Laws of North Carolina (First Session, 1981) is
amended to read as follows:

"§ 120-30.28. Review of rules.--(a) After a rule is filed
with the Director, he shall submit it to the Committee which may
determine whether or not the agency acted within its statutory
authority in promulgating the rule. The Committee shall review a
rule submitted to it by the Director not later than the last day
of the first calendar month following the filing of the rule with
the Director.

The Committee, by a majority vote of the members present and voting, may extend the time for review of a rule by 60 days to obtain additional information on the rule.

(b) If the Committee finds that an agency did not act within its statutory authority in promulgating a rule or a part of the rule, the Committee shall object to the rule. The Director of Research shall transmit to the cochairmen of the Legislative Research Commission, the Attorney General, and the agency a written report of the objection to the rule and the reasons therefor.

(c) Within 30 days after receipt of the Committee's written report, an agency shall either amend or repeal the rule to cure the defects cited as reasons for the Committee's objection or return the rule unamended to the Committee.

(d) To cure the defects cited as reasons for the Committee's objection, the agency may amend or repeal a rule without complying with the notice and hearing requirements contained in G.S. 150A-12. The curative rule is effective upon its filing with the Attorney General.

(e) The filing of an amendment to a rule places the entire rule before the Committee for its review.

(f) If an agency amends or repeals a rule to meet the Committee objection, the Committee shall transmit to the cochairmen of the Legislative Research Commission, the Attorney General, and the agency a written report removing its objection to the rule. If an agency does not amend or repeal a rule to cure the defects cited as reasons for the Committee's objection,

the Committee, by a majority vote of the members present and voting, may remove its objection and shall transmit a written report of such action to the cochairmen of the Legislative Research Commission, the Attorney General, and the agency. If the objection is not removed, the Committee shall transmit to the Governor and the cochairmen of the Legislative Research Commission a written report of the objection to the rule containing the reasons for the objection and the notation that the agency returned the rule unamended to the Committee or failed to return the rule within the time specified in subsection (c).

(g) The Committee or Commission may submit corrective legislation concerning a rule or its part to which the Committee has objected to the General Assembly if then in session or, if not in session, to it in the next regular session. The Committee or Commission may consider and recommend to the General Assembly any legislation it believes would improve administrative procedure and practices in this State. A bill submitted to the General Assembly under this subsection is eligible for consideration in that part of the regular session to which the bill is submitted."

Sec. 3. G.S. 120-30.29A as set forth in Chapter 688 of the 1981 Session Laws of North Carolina (First Session, 1981) is rewritten to read as follows:

"§ 120-30.29A. Actions on rules.--The Committee may institute an action in the Superior Court of Wake County for a declaratory judgment on the issue of whether a rule to which the Committee has objected is valid or within the statutory authority of the

agency.

The agency which promulgated the rule shall be notified of the commencement of the action by service of process pursuant to G.S. 1A-1, Rule 4. The Committee shall have standing to appear in any action authorized by this section or any appeals therefrom. Notwithstanding any other provision of law, the Committee may direct any licensed attorney on the staff of the General Assembly or contract with other counsel to represent the Committee in the action.

In any action in which a rule is determinative of the outcome and in which the rule was objected to by the Committee, the agency must prove that the rule is valid as defined in G.S. 150A-2(9) and within the statutory authority of the agency; provided, however, that five years after the date of adoption of a rule, there is a presumption that the rule was filed in accordance with the procedures set forth in Chapter 150A.

The clerk of the superior court shall file a copy of the order of the court with the Attorney General."

Sec. 4. G.S. 120-30.35 as amended by Chapter 688 of the 1981 Session Laws (First Session, 1981) is further amended by rewriting subsection (a) to read as follows:

"(a) Notwithstanding the time limitation on review of rules contained in G.S. 120-30.28(a), the cochairmen of the Commission may at any time call a public hearing before the Committee on any rule or part of rule upon the recommendation of the Committee or upon the motion of any member of the Commission. Within 60 days after the public hearing, the Committee may find that the agency

did not act within its statutory authority in promulgating the rule or its part and object to the rule in accordance with subsections b, c, d, e, f, and g of G.S. 120-30.28."

Sec. 5. G.S. 120-30.36 as amended by Chapter 688 of the 1981 Session Laws (First Session, 1981) is further amended to read as follows:

"§ 120-30.36. Failure to object; inadmissibility into evidence.--(a) The failure of the Committee to object to a rule shall not be deemed to be approval of the statutory authority of the rule or its part by the Committee, Commission or the legislative branch.

(b) Evidence of the Committee's failure to object to the rule shall be inadmissible in all civil and criminal trials or other proceedings before courts, administrative agencies, or other tribunals."

Sec. 6. G.S. 150A-59(a) as amended by Chapter 688 of the 1982 Session Laws (First Session, 1981) is further amended by rewriting subsection (a) to read as follows:

"(a) Rules adopted by an agency on or after February 1, 1976, shall be filed with the Attorney General. No rule, except temporary rules adopted under the provisions of G.S. 150A-13, shall become effective earlier than the first day of the second calendar month after that filing."

Sec. 7. G.S. 150A-63.1 as set forth in Chapter 688 of the 1981 Session Laws (First Session, 1981) is amended to read as follows:

"§ 150A-63.1. Administrative Rules Review Committee reports.--

The Attorney General shall retain any reports of the Legislative Research Commission's Administrative Rules Review Committee's objection to a rule. He shall append to any compilation, publication, or summation of that rule a notation that it has been objected to pursuant to Article 6C of Chapter 120 of the General Statutes and, where applicable, that the objection has been removed."

Sec. 8. This act is effective upon ratification.

Short Title: HMO's.

(Public)

Representative

Referred to:

A BILL TO BE ENTITLED

AN ACT TO AMEND THE POWERS OF THE COMMISSIONER OF INSURANCE TO
REGULATE HEALTH MAINTENANCE ORGANIZATIONS.

The General Assembly of North Carolina enacts:

Section 1. G.S. 57B-3(c) (9) is amended by inserting the following between "three-year" and "projection": "actuarial".

Sec. 2. G.S. 57B-4(a) (4) is amended by adding the following sentence at the end of the paragraph:

"The Commissioner may require such deposit up to a maximum of twenty-five thousand dollars (\$25,000) as he deems necessary for the protection of enrollees; provided, however, that the Commissioner shall allow such deposits to be in the form of cash, securities, or certificates of deposit or the applicant shall be permitted to post a surety bond in the specified amount."

Sec. 3. This act is effective upon ratification.

Short Title: Correction/Rules.

(Public)

Representative

Referred to:

A BILL TO BE ENTITLED

AN ACT TO CLARIFY THE DEPARTMENT OF CORRECTION'S RULE-MAKING PROCEDURES.

The General Assembly of North Carolina enacts:

Section 1. G.S. 148-11 is amended by rewriting the first sentence to read:

"The Secretary shall adopt rules for the government of the State prison system in accordance with the provisions of Article 5 of Chapter 150A. In the case of temporary rules, such rules shall become effective immediately upon adoption by the Secretary and shall be filed in accordance with G.S. 150A-13 within two working days of adoption."

Sec. 2. G.S. 150A-1(a) is amended by rewriting the second sentence of the first paragraph to read:

"The following are specifically exempted from the provisions of this Chapter: The Department of Correction (except for Article 5 of this Chapter and G.S. 150A-13 which shall apply), the Employment Security Commission, the Industrial Commission, the Occupational Safety and Health Review Board, the Commission of Youth Services, and the Utilities Commission."

Sec. 3. This act is effective upon ratification.

Short Title: Nursing Home Administrators.

(Public)

Representative

Referred to:

A BILL TO BE ENTITLED

AN ACT TO AMEND THE NURSING HOME ADMINISTRATOR ACT.

The General Assembly of North Carolina enacts:

Section 1. G.S. 90-276 is rewritten to read:

"§ 90-276. Definitions.--For the purposes of this Article and as used herein:

(1) 'Administrator-in-training' means an individual registered with the Board who serves a training period under the supervision of a preceptor.

(2) 'Board' means the North Carolina State Board of Examiners for Nursing Home Administrators.

(3) 'Nursing home' means any institution or facility defined as such for licensing purposes under G.S. 130-9(e) of the General Statutes, whether proprietary or nonprofit, including but not limited to nursing homes owned or administered by the federal or state government or any agency or political subdivision thereof and nursing homes operated in combination with a home for the aged or any other facility.

(4) 'Nursing home administrator' means a person who administers, manages, supervises, or is in general administrative

charge of a nursing home, whether such individual has an ownership interest in such home and whether his functions and duties are shared with one or more individuals.

(5) 'Preceptor' means a person who is a licensed and registered nursing home administrator and meets the requirements of the board to supervise administrators-in-training during the training period."

Sec. 2. G.S. 90-278(1) is amended by inserting a new paragraph c. and redesignating the present paragraph c. as d.:

"c. He has successfully completed his training period as an administrator-in-training as prescribed by the board."

Sec. 3. G.S. 90-285 is amended by adding a new subdivision (11) to read:

"(11) Develop an administrator-in-training program to insure that nursing home administrators have adequate training and experience prior to licensure."

Sec. 4. This act is effective upon ratification.

APPENDIX G

tion milkshake with a minimum temperature of 25 degrees F. in a retail establishment.

(l) "Imitation Frozen Dessert" means any substance, mixture or compound, which is made in imitation of, or does in fact imitate, any frozen dessert or frozen dessert mix for which a standard of identity has been established in 21 CFR 135 or these Rules, and which does not conform to said standard of identity.

(m) "Milk Products" means and includes: cream, dried cream, plastic cream (sometimes known as concentrated milk fat), butter, butter oil, milk, concentrated milk, evaporated milk, sweetened condensed milk, superheated condensed milk, dried milk, skim milk, concentrated skim milk, evaporated skim milk, condensed skim milk, sweetened condensed part-skim milk, nonfat dry milk, sweet cream buttermilk, condensed sweet cream buttermilk, dried sweet cream buttermilk, skim milk that has been concentrated and from which part of the lactose has been removed by crystallization, skim milk in concentrated or dried form which has been modified by treating the concentrated skim milk with calcium hydroxide and disodium phosphate, lactose (pure milk sugar), concentrated cheese whey and dried cheese whey.

History Note: Statutory Authority G.S. 106-253; 106-267; Eff. February 1, 1982.

18141

.0203 INSPECTION CERTIFICATES

(a) A person shall not operate as a wholesale or retail frozen dessert manufacturer, a wholesale or retail cheese manufacturer, or as a wholesale butter processing manufacturer without first obtaining an inspection certificate issued by the Commissioner of the North Carolina Department of Agriculture.

(b) Inspection certificates shall be issued upon:

- (1) a determination by the Commissioner that the manufacturer is operating in a clean and sanitary manner in compliance with statutory requirements and these Rules and is producing a product that is pure, wholesome and non-deleterious to health; and
- (2) payment of the appropriate fee as set out in N.C.G.S. 106-254.

(c) All inspection certificates shall expire on June 30 of each year and are non-transferable.

History Note: Statutory Authority G.S. 106-253; 106-254; 106-267; Eff. February 1, 1982.

18142

.0204 SUSPENSION OF INSPECTION CERTIFICATE/PENALTIES

(a) If, during the period for which an inspection certificate is in effect, the Commissioner determines that a retail frozen dessert freezer, dispenser milk machine, or mobile frozen dessert unit does not comply with G.S. 106, Article 26 or these Rules,

APR 30 1982
DATE FILED:

DIRECTOR OF RESEARCH

AGENCY REPORT: Legislative Review of Administrative Rules
(G.S. 120-30.20 et seq.)Date: April 30, 1982

(for Receipt Stamp)

From: Gail S. Rothstein
(name)Adm. Procedures Act Coordinator - N. C. Board of Agriculture
(agency & address)P. O. Box 276471 W. Edenton St.Raleigh, NC 27611Phone: 733-6248To: Terrence D. Sullivan
Legislative Research Commission
2129 State Legislative Building
Raleigh, North Carolina 27611 - Phone: 919-733-7044RULE: 2 NCAC 20B .0426(c)
(citation; N. C. Administrative Code)

1984

RENTAL RATES, FEES, AND PREMIUM BOOKS
(catchline)

(1) RULE SUMMARY

Rule formalizes pre-existing Board of Agriculture procedure
in giving notice per APA before action is taken on fee schedules

(2) STATUTORY AUTHORITY CITATION

G.S. 106-503; 106-503.1(b)

(3) CIRCUMSTANCES REQUIRING RULE

Rule enacted in the public interest and due process in conjunctive
effort with Administrative Rules Review Committee

(4) EFFECTIVE DATE

H-1

Amended Eff. June 1, 1982

Form-10:LSO:Rev. 3/1/79

2 NCAC 20B .0426; RENTAL RATES, FEES, AND PREMIUM BOOKS; has been amended by the addition of a new (c) as follows:

18911

(c) The Board of Agriculture shall give notice of any hearing at which fees and other charges governing rental rates for State Fair properties and services or premium books are approved pursuant to the procedures outlined in N.C.C.S. 150A-12.

History Note: Statutory Authority G.S. 106-503; 106-503.1

(b);

Eff. February 1, 1982;

Amended Eff. June 1, 1982.

APR 29 1981

DATE FILED:

DIRECTOR OF RESEARCH

AGENCY REPORT: Legislative Review of Administrative Rules
(G.S. 120-30.20 et seq.)Date: April 23, 1981

(for Receipt Stamp)

From: Marion Johnson
(name)Adm. Procedures Act Coordinator - _____
(agency & address)Division of State Library - Department of Cultural Resources109 East Jones StreetRaleigh, NC 27611Phone: 733-2570To: Terrence D. Sullivan
Legislative Research Commission
Legislative Annex
10 East Jones Street
Raleigh, North Carolina 27611 - Phone: 919-733-7044
919-733-6182RULE: 7 NCAC 2F .0005
(citation; N. C. Administrative Code)Examination
(catchline)

14953.1

(1) RULE SUMMARY

To provide information regarding the Comprehensive Examination in Library Science given for applicants.

(2) STATUTORY AUTHORITY CITATION

G.S. 143B-67

(3) CIRCUMSTANCES REQUIRING RULE

To reflect action taken by the North Carolina Public Librarian Certification Commission.

(4) EFFECTIVE DATE
June 1, 1981.

SUBCHAPTER 2F - NORTH CAROLINA PUBLIC LIBRARIAN
CERTIFICATION COMMISSION

.0005 EXAMINATION

The Comprehensive Examination in Library Science will be given for applicants for certification at least three times a year.

History Note: Statutory Authority G.S. 143B-67;
Eff. June 1, 1981.

NOTICE OF OBJECTION AND DELAY OF EFFECTIVE DATE

DATE: November 20, 1981

TO: Honorable James B. Hunt, Jr., Governor
 Honorable James C. Green, Lt. Governor
 Liston B. Ramsey, Speaker of the House
 W. Craig Lawing, President Pro Tempore of the Senate
 John W. Lassiter, Associate Attorney General
 N. C. Board of Nursing Home Administrators

FROM: Terrence D. Sullivan *T.D.S.*
 Director of Research
 Legislative Research Commission
 Legislative Annex
 10 East Jones Street
 Raleigh, North Carolina 27611 Phone: 919-733-6182

The following rules have been determined to lack statutory authority and are the subject of an objection and delay of effective date by the Administrative Rules Review Committee pursuant to G.S. 120-30.28(b):

RULE: 21 NCAC 37 .0204 (Secondary Education)
 21 NCAC 37 .0302 (Registration Fee)
 21 NCAC 37 .0305 (Proof of Ability)
 21 NCAC 37 .0500 (Administrator-in-Training)
 21 NCAC 37 .0104 (Nursing Home Administrator-in-Training)
 21 NCAC 37 .0109 (Preceptor)
 21 NCAC 37 .1004 (Relation to AIT Experience)
 21 NCAC 37 .0902 (Registration and Re-registration of Licenses)

This action is effective upon receipt of the Notice by the Attorney General. G.S. 120-30.28(c) states that an agency has 30 days after receipt of this notice to amend or repeal the rule to cure the defects cited by the Committee or return the rule unamended. G.S.120-30.28(f) provides that rules returned unamended are reviewed by the Governor or Council of State, who may end the Committee's delay.

STATE OF NORTH CAROLINA
ADMINISTRATIVE RULES REVIEW COMMITTEE
LEGISLATIVE RESEARCH COMMISSION
STATE LEGISLATIVE BUILDING
RALEIGH 27611

SENATOR ROBERT B. JORDAN, III
CHAIRMAN

REPRESENTATIVE WILLIAM E. CLARK
REPRESENTATIVE CHARLES D. EVANS
REPRESENTATIVE JAMES F. MORGAN
REPRESENTATIVE MARTIN L. NESBITT, JR.
REPRESENTATIVE KENNETH B. SPAULDING
SENATOR WILLIAM A. CREECH
SENATOR CECIL R. JENKINS, JR.
SENATOR CHARLES E. VICKERY



STAFF:
TERRENCE D. SULLIVAN
DIRECTOR OF RESEARCH
WINSTON L. PAGE, JR.
E. ANN CHRISTIAN
SUSAN H. FROST
STAFF ATTORNEYS
WENDY C. LAPISH
RESEARCH ASSISTANT

November 20, 1981

Mr. William A. Moon,
Administrative Procedures Act Coordinator
N. C. Board of Nursing Home Administrators
P. O. Box 12200
Raleigh, North Carolina 27605

Dear Mr. Moon:

At its November 19, 1981 meeting, the Administrative Rules Review Committee reviewed the rules filed by your board on September 28, 1981.

The Committee directed the staff to request the board to make technical amendments to the following rules as indicated:

- (1) 21 NCAC 37 .0101 - The statutory authority should be changed from G.S. 90-278 to G.S. 90-285(1).
- (2) 21 NCAC 37 .0104 - The statutory authority should be changed from G.S. 90-278 to G.S. 90-285(1).
- (3) 21 NCAC 37 .0106 - G.S. 130-9(e)(2) should be added as statutory authority for this rule.
- (4) 21 NCAC 37 .0110 - This rule should be amended to reflect the grounds for suspension set forth in G.S. 90-285.1.
- (5) 21 NCAC 37 .0111 - The rule should be amended to reflect the grounds for suspension set forth in G.S. 90-285.1.
- (6) 21 NCAC 37 .0112 - The rule should be amended to reflect the grounds for revocation set forth in G.S. 90-285.1.
- (7) 21 NCAC 37 .0206 and .0207 - These rules were repealed on April 8, 1977 and should not have been readopted.
- (8) 21 NCAC 37 .0208 - The statutory authority should be changed from G.S. 90-278 to G.S. 90-280.
- (9) 21 NCAC 37 .0802 and .0803 - These rules were repealed and should not have been readopted.
- (10) 21 NCAC 37 .0905 - This rule should be amended to delete the reference to "required" continuing education evidence.

(11) 21 NCAC 37 .0914 - The statutory authority should be changed from G.S. 90-285 to G.S. 90-280(d).

The Committee reviewed the following rules and voted to object to and delay the rules for the reasons indicated:

(1) 21 NCAC 37 .0204 - The rule requires that an applicant complete two years of college on or after January 1, 1975 and receive a baccalaureate degree on or after January 1, 1982. The Committee noted that this rule has been amended effective January 1, 1982 to remove the degree requirement. However, in view of G.S. 90-278(1)(b), which does not mention any additional educational requirements other than "sufficient education . . . in the foregoing fields" (which are services provided by nursing homes, laws governing nursing homes, protection of patient interests and nursing home administration), the Committee objected to this rule due to lack of statutory authority.

(2) 21 NCAC 37 .0302 - The rule requires payment of an "initial registration fee of one hundred fifty dollars". G.S. 90-280 entitled Fees; display of license; duplicate license; inactive list does not mention a registration fee. The Committee objected to this rule due to lack of statutory authority.

(3) 21 NCAC 37 .0305 - This rule requires that an applicant submit evidence of his "ability to relate the physical, psychological, spiritual, emotional, and social needs of ill and/or aged individuals to the administration of a nursing home, including executives of the nursing home; and, to create the compassionate climate necessary to meet the needs of the patients therein." The Committee noted that the existence of such qualities cannot be proved by any evidence. The Committee objected to the rule due to lack of statutory authority.

(4) 21 NCAC 37 .0500 - The Committee objected to this entire section of rules, as well as 21 NCAC 37 .0104, 21 NCAC 37 .0109, and 21 NCAC 37 .1004. While G.S. 90-278 and G.S. 90-285 do authorize the Board to promulgate rules which assure that licensed individuals have sufficient training in the field of nursing home administration, at no point does Article 20 of Chapter 90 of the General Statutes set forth an administrator-in-training program as required by the cited rules. The Committee noted that administrator-in-training and preceptor are not defined in G.S. 90-276 entitled Definitions. The Committee particularly noted 21 NCAC 37 .1004 which provides that "no portion of the time served by a person with a temporary license shall be counted toward the requirements of AIT as stated in Section .0500 of this Subchapter." The Committee objected to these rules due to lack of statutory authority.

(5) 21 NCAC 37 .0902 - This rule provides that an inactive licensee who applies for relicensure after three years of inactivity must "serve an internship under an approved preceptor for a period of at least 12 weeks." The Committee objected to this rule due to lack of statutory authority.

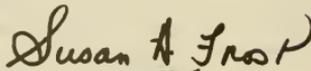
These objections are filed at the direction of the Administrative Rules Review Committee pursuant to G.S. 120-30.28(b).

G.S. 120-30.28(c) provides that an agency shall either amend or repeal the rules to cure the defects cited by the Committee or

return the rules unamended within 30 days of receipt of the report. These rules may be amended without going through the normal hearing procedure.

The Committee also directed the staff to inquire whether the Board is represented by legal counsel. If so, the Committee would appreciate being informed of the name and address of the Board's attorney.

Very truly yours,

A handwritten signature in black ink that reads "Susan H. Frost". The signature is written in a cursive style with a large, sweeping "S" and "F".

Susan H. Frost
Staff Attorney

Enclosures

AGENCY REPORT: Legislative Review of Administrative Rules
(G.S. 120-30.20 et seq.)Date: January 18, 1980 (for Receipt Stamp)From: Ronald Raxter
(name)
Adm. Procedures Act Coordinator - _____
(agency & address)Department of InsuranceP. O. Box 26387Raleigh, N. C. 27611Phone: 733-4700To: Terrence D. Sullivan
Legislative Research Commission
2129 State Legislative Building
Raleigh, North Carolina 27611 - Phone: 919-733-7044ULE: 11 NCAC 14 .0303
(citation; N. C. Administrative Code)
Financial Certification; HMO
(catchline)

10265

1) **RULE SUMMARY**

This rule sets forth and describes the financial certification which must be filed with the Commissioner by any health maintenance organization seeking a certificate of authority in this State.

2) **STATUTORY AUTHORITY CITATION**

57A-3(c) (9), -4, -3(b) (2)

3) **CIRCUMSTANCES REQUIRING RULE**

Statutes specifically require the Commissioner to evaluate the financial conditions and potential success of each applicant HMO. This rule enables the Commissioner to make this evaluation. Statutes also require each such applicant organization to file a three projection of the initial operating results anticipated. This rule completely defines the filing requirements of the three year projection.

4) **EFFECTIVE DATE**

January 22, 1980

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- (9) The results of the feasibility study and market survey as described in 11 NCAC 14.0301; and
- (10) If currently available, but in no case later than the time of the issuance of the Certificate of Authority pursuant to 11 NCAC 14.0305:

- (A) A copy of any contract made or to be made between any providers and the applicant;
- (B) A copy of the form of evidence of coverage to be issued to the enrollees; and
- (C) A copy of the form of the group contract, if any, which is to be issued to employers, unions, trustees or other organizations.

(b) The Certificate of Authority so issued shall only permit the applicant to solicit contingent enrollee subscribers, to present the plan to employers and other groups on a contingent subscription basis and to enter into contingent contracts with providers through which health care and/or hospital services are to be provided to enrollees and prospective enrollees of the applicant. Under no conditions may the applicant accept prepayment fees or commence the normal operations of an HMO prior to the issuance of the Certificate of Authority in accordance with 11 NCAC 14.0305.

History Note: Statutory Authority G.S. 57A-3(c), -4
Eff. January 22, 1980.

10265

.0303 FINANCIAL CERTIFICATION; HMO

After the applicant has performed, or caused to be performed, a feasibility study on the proposed operations of the HMO and has developed a specific plan of operation, this information should be submitted to the applicant's staff actuary, a recognized actuarial consultant or a recognized health care consultant for completion of an actuarial projection of the anticipated operational results for a three-year period based on the initial working capital of the applicant, any additional sources of funds to be provided, the proposed rate schedules, the expected number of enrollees during the period, and the applicant's plan or operation. This projection should include, but not be limited to the following:

- (1) Certification that the amount of money actually available for working capital is sufficient to carry all acquisition costs and operating expenses for at least the three-year period and that the applicant is financially responsible and may reasonably be expected to meet its obligations to enrollees and prospective enrollees on a continuing basis;
- (2) Certification that the rates to be charged by the applicant for prepaid health services are neither excessive, inadequate nor unfairly discriminatory;
- (3) Determination of an adequate reinsurance program to amply protect the applicant against large claims arising in cases of major health care needs of enrollees, if the financial condition of the applicant requires such a program; and

- (4) Consideration be given in the three year projection to the possible effects of adverse selection and over-utilization of services by enrollees of the applicant.

History Note: Statutory Authority G.S. 57A-3(c) (9), -4, -8(b) (2); Eff. January 22, 1980.

.0304 REINSURANCE REQUIREMENTS; HMO 102-66

If indicated in the financial certification as contained in 11 NCAC 14.0303(3), the applicant shall be obligated to enter into reinsurance contracts with a solvent carrier in accordance with the adequate reinsurance program determined in and utilized for this actuarial certification.

History Note: Statutory Authority G.S. 57A-4(b) (3) Eff. January 22, 1980. 10769

.0305 ISSUANCE OF CERTIFICATE OF AUTHORITY; HMO

(a) A Certificate of Authority granting the applicant full authority to operate as an HMO shall be issued by the commissioner upon payment of the application fee prescribed in G.S. 57A-20 and upon the commissioner being fully satisfied that the applicant has complied with the provisions of Chapter 57A of the North Carolina General Statutes and the requirements contained herein, and all evidence presented indicates the applicant to have a reasonable potential for success in the operation of a health maintenance organization.

(b) Any material filed in accordance with NCAC 14.0302 which has materially changed since the original date of filing with the commissioner shall be updated and refiled prior to the granting of a Certificate of Authority. The commissioner may also require any additional information for review as he deems necessary in making the decision on the issuance of this Certificate of Authority to the applicant.

(c) All applicants not domiciled on this State must file a power of attorney duly executed by such applicant appointing the commissioner and his successors in office, and duly authorized deputies, as the true and lawful attorney of such applicant in and for this State upon whom all lawful process in any legal action or proceeding against the health maintenance organization on a cause of action arising in this State may be served.

History Note: Statutory Authority G.S. 57A-4, -3(c) (10) Eff. January 22, 1980. 10769

.0306 FOREIGN HMO; SUCCESSFUL OPERATION

Foreign health maintenance organizations seeking admission to North Carolina must have net operational gains for three consecutive years next preceding the date of application for admission; however, on an individual case basis only, such applicants may be considered for admission if they have a minimum of one year of net operational gains and the financial certification as described in 11 NCAC 14.0303 reflects continuing operational gains for at least the next three years.

DATE FILED:AGENCY REPORT: Legislative Review of Administrative Rules
(G.S. 120-30.20 et seq.)Date: January 18, 1930 (for Receipt Stamp)From: Ronald Raxter
(name)
Adm. Procedures Act Coordinator - _____
(agency & address)Department of InsuranceP. O. Box 26387Raleigh, N. C. 27611Phone: 733-4700To: Terrence D. Sullivan
Legislative Research Commission
2129 State Legislative Building
Raleigh, North Carolina 27611 - Phone: 919-733-7044FILE: 11 NCAC 14 .0307
(citation; N. C. Administrative Code)Deposit Requirements; HMO

(catchline)

1) **RULE SUMMARY**

This rule discusses the deposits which are to be required of all health maintenance organizations seeking a certificate of authority in this jurisdiction prior to commencing the normal operations of such an organization.

2) **STATUTORY AUTHORITY CITATION**

57A-1(a) (4), -4(b) (3)

3) **CIRCUMSTANCES REQUIRING RULE**

Statutes require alternative coverage be available in the event of discontinuance of any plan of any health maintenance organization in this State. The amount of deposit required by this rule is considered to be a minimum to amply protect North Carolina enrollees should any plan be discontinued. In such an occurrence, it would be necessary to transfer assets to the reinsurer to at least partially cover the liabilities assumed by such reinsurer in case of an insolvency of any HMO. This deposit could be used for that purpose.

4) **EFFECTIVE DATE**

January 22, 1930

Form-10:LSO:Rev. 3/1/79

History Note: Statutory Authority G.S. 57A-3; 58-150(2);
Eff. January 22, 1980.

10269

.0307 DEPOSIT REQUIREMENTS; HMO

(a) A minimum initial deposit of \$25,000 of market value eligible securities or such higher amount as may be indicated by the actuarial projection shall be required of all such applicants prior to commencing the normal operations of a health maintenance organization in this State.

(b) The commissioner may require additional deposits of such organizations when deemed necessary for the protection of North Carolina enrollees based upon one or more of the following conditions:

- (1) The organization is operating with unsatisfactory results as determined by the commissioner from an annual statement, an interim financial statement or a report on examination;
- (2) The organization has sustained a substantial loss in working capital as reflected in an annual statement, an interim financial statement, or a report on examination; or
- (3) The organization is found by the commissioner to be in such an unsound condition that such organization is potentially unable to fulfill enrollee and provider contracts.

History Note: Statutory Authority G.S. 57A-4(a)(4); -4(b)(3)
Eff. January 22, 1980.